A **TU LEH HO & ANOR**

v.

ANIN LENGIE & ANOR

B HIGH COURT SABAH & SARAWAK, SIBU
HAMID SULTAN ABU BACKER JC
[CIVIL APPEAL NO: 12-10-2008]
4 FEBRUARY 2009

C ***TORT:*** *Negligence - Proof - Onus of proof - Collision between two vehicles in opposite direction - Defendant being a material witness does not give evidence - Whether facts asserted by plaintiff has formidable evidential value - Prima facie rebuttable presumption that both drivers are negligent*

D ***TORT:*** *Negligence - Res ipsa loquitur - Application of maxim - Accident between car and prime-mover trailer - Car driver and passenger killed - Driver of prime-mover failing to lodge police report and failing to give evidence - Prime mover found at appellants' lane - Doctrine of res ipsa loquitur applicable - Prima facie case of negligence proved*

E In a motor vehicle accident between a car and a prime-mover trailer, the driver and the passenger of the car died (the plaintiffs/ appellants). The 1st respondent, the driver of the prime-mover did not lodge a police report which is a mandatory requirement under s. 52(2) of the Road Transport Act 1987. Besides he did not give
F evidence. Evidence on behalf of the appellants was given by two police officers, who were not eye witnesses to the accident. The appellants had pleaded *res ipsa loquitur*. The prime mover was found at the appellants' lane but the learned sessions judge came to the conclusion that the driver of the car was at fault. Hence this appeal
G by the appellants.

Held (allowing the appeal partly and holding that liability be apportioned on a 50:50 basis)

(1) The learned judge had assumed liability against the deceased
H driver without giving much consideration to the evidence which was favourable to the plaintiffs. There was no eye witness and the 1st defendant did not give evidence or make a police report. The prime-mover was also found in the deceased's side of the lane and the plaintiffs had on the facts on justifiable grounds,
I pleaded the doctrine of *res ipsa loquitur*. (para 4)

(2) Although the appellate court will not interfere in the finding of facts of the trial judge, on the present facts, the judgment clearly showed the trial judge had failed to consider relevant matters and in consequence appellate interference was warranted to dispense justice. (para 4)

(3) In cases where the defendant does not give evidence and is a material witness to the case, *prima facie*, the facts asserted by the plaintiff has formidable evidential value for various reasons in law, inclusive of the law relating to adverse presumption. If the facts show that there was a collision between two vehicles in opposite direction, in the absence of special circumstances, there is a *prima facie* presumption that both drivers are negligent and the onus falls on each of them to show that the other was negligent. (para 7)

Case(s) referred to:

Baker v. Market Harborough Industrial Cooperative Society Ltd [1953] 1 WLR 1472 ***(refd)***

France Parkinson [1954] All ER 739 ***(refd)***

Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 ***(refd)***

Ong Yam Chong & Anor v. Chan Wah [1961] 1 LNS 76 HC ***(refd)***

Teoh Guat Looi v. Ng Hong Guan [1998] 4 CLJ 416 CA ***(refd)***

UN Pandey v. Hotel Marco Polo Pte Ltd [1978] 1 LNS 223 HC ***(refd)***

Voon Jan Choo v. Lee Chie Siang & Anor [2007] 9 CLJ 242 HC ***(refd)***

Wong Thin Yit v. Mohamed Ali [1971] 1 LNS 151 FC ***(refd)***

Legislation referred to:

Road Transport Act 1987, s. 52(2)

For the appellants/plaintiffs - Esther Wong; M/s David Allan Sagah & Teng Advocates

For the respondents/defendants - Gordon Tang; M/s Chew Jugah Wan Ullok & Co

Reported by Amutha Suppayah

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the appellants'/plaintiffs' (suing in the personal capacity as administrator/administratrix of the estate of the deceased) involved in the motor vehicle accident.

Brief Fact

[2] In a motor vehicle accident between a car and a prime-mover trailer, the driver and the passenger of the car died. The 1st respondent, the driver of the prime-mover did not lodge a police report which is a mandatory requirement under s. 52(2) of the Road Transport Act 1987. Besides he did not give evidence. Evidence on behalf of the plaintiffs' was given by two police officers, who were not eye witnesses to the accident. The appellants had pleaded *res ipsa loquitur*. The prime mover was found at the plaintiffs' lane but the learned sessions judge came to the conclusion that the driver of the car was at fault.

Memorandum of Appeal

[3] The appellants have filed a lengthy memorandum of appeal. In essence the learned counsel for the appellants says:

a. that the 1st Respondent who is the only surviving party of the accident was not present at the scene of the accident when the police arrived.

b. that the 1st Respondent did not give evidence in the court to support the respondent's case.

c. that the 1st Respondent had not lodged a comtemporaneous police report of the accident as required and therefore was in contravention of the Road Transport Act 1987.

d. that the learned session court judge failed to direct his mind that there was no evidence of broken glass/debris at the scene of the accident when both the driver and the passenger of the appellants' car were still trapped inside the car and the 1st Respondent ie, the driver of the prime mover trailer was nowhere to be found when PW1 Sergeant Busri bin Kiprawai arrived at the scene of the accident.

Preliminaries

[4] The learned sessions judge in a six page judgment on liability had assumed liability against the deceased driver without giving much consideration to the evidence which was favourable to the plaintiffs. In this case there was no eye witness; the 1st defendant did not give evidence or make a police report. The prime-mover was also found in the deceased's side of the lane and the plaintiffs have on the facts on justifiable grounds, pleaded the doctrine of *res ipsa loquitur*. It is trite the appellate court will not interfere in the finding of facts of the trial judge. However, on the facts of this

case, the judgment clearly shows the trial judge had failed to consider relevant matters and in consequence appellate interference is warranted to dispense justice. (See *Voon Jan Choo v. Lee Chie Siang & Anor* [2007] 9 CLJ 242). Further, the law on liability in respect of the defendant who did not give evidence in the instant case, was not adequately considered by the trial judge.

The law if defendant fails to give evidence

[5] It is trite that to succeed in a motor accident case, the plaintiff must prove that the defendant was negligent. In *Wong Thin Yit v. Mohamed Ali* [1971] 1 LNS 151 the Federal Court asserted that:

> In a negligence action the onus of proof rests wholly on the plaintiff, whether or not the defendant gives evidence. The plaintiff cannot succeed without proof of the defendant's negligence. "Evidence is the foundation of proof, with which it must not be confounded. Proof is that which leads to a conclusion as to the truth or falsity of alleged facts which are the subject of inquiry. Evidence, if accepted and believed, may result in proof, but it is not necessarily proof of itself."

[6] This can also be effectively done, by showing that there was a duty on the part of the defendant towards the plaintiff and the defendant negligently performed or omitted to perform his duty and that effectively caused injury to the plaintiff. See *Voon's* case (*supra*).

[7] In cases where the defendant does not give evidence and is a material witness to the case, *prima facie*, the facts asserted by the plaintiff has formidable evidential value for various reasons in law, inclusive of the law relating to adverse presumption. In consequence, the trial judge in an accident case is duty bound to consider the issue of liability, ie, whether the plaintiff should be wholly or partly liable, as the case may be, taking into consideration the facts of the case. For example if the facts show that there was a collision between two vehicles in opposite direction, in the absence of special circumstances, there is a *prima facie* presumption that both drivers are negligent and the onus falls on each of them to show that the other was negligent. (See *Ong Yam Chong & Anor v. Chan Wah* [1961] 1 LNS 76). Support for the proposition can be found in a number of cases: (a) In *Teoh Guat Looi v. Ng Hong Guan* [1998] 4 CLJ 416 the plaintiff brought a dependency action against the defendant in respect of the death of her husband, Tay Kok Wah ('the deceased'). The undisputed facts were that the deceased and one Ng Seng Wah ('Ng') were standing

on either side of Ng's car when the defendant reversed his car into the side where the deceased was standing. Ng did not witness the actual collision, but, having heard the crashing sound of the defendant's car colliding into his car, saw the deceased lying on the ground, gravely injured. The deceased later died in hospital. In her statement of claim, the plaintiff pleaded *res ipsa loquitur*. At the trial, the defence submitted that there was no case to answer at the close of the plaintiff's case. The judge put counsel for the defence to his election to stand by his submission and not to call evidence. After considering the evidence, the judge found that negligence had not been proved because he disbelieved the evidence of Ng, who was the only eye-witness called by the plaintiff, and dismissed the plaintiff's action. The plaintiff appealed. The Court of Appeal by majority held:

> i. The circumstances of an accident may raise the presumption of negligence under the maxim of *res ipsa loquitur*. The defendant's car was found in a position where, in the ordinary course of things, it had no right to be, that is, colliding with Ng's car. Plainly, the accident could not have happened without negligence on the defendant's part and a *prima facie* case of negligence was established.
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> ii. A *prima facie* case is established where it is not possible to prove precisely how an accident happened, and the evidence shows the accident could not have happened without negligence on the defendant's part.
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> iii. Although Ng did not see how the accident happened, it occurred in a way that *prima facie* could not have happened without negligence on the defendant's part. This *prima facie* case shifted to the defendant the onus of proving that he was not negligent. The defendant made no attempt to do that. This was a classic case of *res ipsa loquitur*.
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> iv. On the evidence, the plaintiff had succeeded in establishing liability. As the defendant had elected not to call evidence, there was no question of ordering a new trial. The appeal was allowed, and the case remitted to the trial judge for assessment of damages only.

(b) In *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509, in which the issue was similar to the instant case, the Federal Court made the following observation:

> Nevertheless, based on the facts and circumstances of the case, the appellants, relying on *res ipsa loquitur*, had established a *prima facie* case of negligence which was not rebutted by the 1st respondent by means of any explanation consistent with the absence of negligence.

Furthermore, as the 1st respondent had chosen not to give evidence, an adverse inference had to be drawn against him which would have the effect of making the respondents wholly liable.

a. The doctrine of *res ipsa loquitur* is, in truth, a mere rule of evidence.

b. The mere happening of an accident is not *res ipsa loquitur*. However, if the accident involves a demonstrable degree of negligence, be it a minor one, then the doctrine, which is a rule of evidence, applies.

[8] I have read the memorandum of appeal, appeal record and the submission of the parties in detail. I take the view the appeal must be allowed partly. My reasons are as follows:

(a) In this case, the learned trial judge did not consider material issues which are necessary and essential to determine liability in whole or part. I have set out the reason in the caption preliminaries and I do not wish to repeat the same.

(b) In this case, the failure of the defendant in not giving evidence and lodging a police report acts in favour of the plaintiff. In *UN Pandey v. Hotel Marco Polo Pte Ltd* [1978] 1 LNS 223 the court observed:

It is not often realized that in civil cases, as much as in criminal cases, a party must prove his case before the burden of proof shifts to the other side. In a criminal case the prosecution's burden is a heavy one. In civil case, it is on a balance of probabilities. But the proof is that the balance must be tilted by the plaintiff before the defendant makes his case.

[9] In accident cases it takes a different dimension, (see *France Parkinson* [1954] All ER 739). In the instant case there is already a presumption that both the parties are equally negligent ie, 50:50. Thus, at the close of the plaintiffs' case taking all the facts into consideration and the plea of *res ipsa loquitur*, the defendant is 50% liable, (see *Ong Yam*'s (*supra*)). If the presumption as stated in Ong's case is to be given recognition, then the learned sessions judge ought to have held that the defendant was 50% liable for the accident unless there was evidence to show that the defendant was wholly liable, as was decided on the facts by the Federal Court in *Jaafar*'s case (*supra*).

(c) I am inclined to accept the submission of the appellant relating to liability, save to say that the liability must be on the facts on a 50:50 basis, in reliance of the decision of *Baker v. Market Harborough Industrial Cooperative Society Ltd* [1953] 1 WLR 1472, 1476 where Lord Denning LJ (as he then was) observed:

> It is pertinent to ask, what would have been the position if there had been a passenger in the back of one of the vehicles who was injured in the collision? He could have brought an action against both vehicles. On proof of the collision in the centre of the road, the natural inference would be that one or other or both were to blame. If there was no other evidence given in the case, because both drivers were killed, would the court, simply because it could not say whether it was only one vehicle that was to blame or both of them, refuse to give the passenger any compensation? The practice of the courts is to the contrary. Every day, proof of the collision is held to be sufficient to call on the two defendants for an answer. Never do they both escape liability ... In the absence of any evidence enabling the court to draw a distinction between them, they must be held both to blame, and equally to blame. It is very different from a case where one or other only is to blame, but clearly not both. Then the judge ought to make up his mind between them, as this Court said recently in *Bray v. Palmer* [1953] 1 WLR 1455. But when both may be to blame, the judge is under no such compulsion and can cast the blame equally on each ... Assume that one of the vehicles was over the centre line a few inches, and thus to blame, why did not the other one pull in more to its near side? The absence of any avoiding action makes that vehicle also to blame. And once both are to blame, and there are no means of distinguishing between them, then the blame should be cast equally on each.

[10] For reasons stated above, I make the following orders:

(i) the order of the Sessions Court dated 26 May 2006, be set aside and the issue of liability to be held on a 50:50 basis

(ii) the appellants be at liberty to assess quantum before the Sessions Court.

(iii) the respondents to pay costs to the appellants. The getting up fees shall not exceed RM10,000. If costs cannot be agreed, the appellants are at liberty to tax the costs.